SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-022101 10/22/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

FRIENDS OF PINTO CREEK, et al. HOWARD M SHANKER

v.

STEPHEN A OWENS, et al. JOSEPH P MIKITISH

BRAD BARTLETT
WESTERN MINING ACTION PROJECT
2260 BASELINE RD, ST 101A
BOULDER CO 80302
ROGER FLYNN
WESTERN MINING ACTION PROJECT
2260 BASELINE RD, STE 101A
BOULDER CO 80302
AMY R PORTER
OFFICE OF ADMINISTRATIVE HEARINGS

MINUTE ENTRY

Friends of Pinto Creek and Citizens for the Preservation of Powers Gulch and Pinto Creek ("Plaintiffs") appeal from a final administrative decision of the Director of the Arizona Department of Environmental Quality ("ADEQ") concerning an Air Quality Control Permit issued to Carlota Copper Company ("Carlota").[1] This Court has jurisdiction of this administrative appeal pursuant to the Administrative Review Act, A.R.S. §§ 12-901, et seq. This case has been under advisement and the Court has considered and reviewed the record of the

[1] Class II Air Quality Control Permit, Number 1001731, February 26, 2003, ("2003 Permit") affirmed in In the Matter of Mineral Policy Center, Friends of Pinto Creek and Citizens for the Preservation of Powers Gulch and Pinto Creek Re: Carlota Copper Company Permit No. 1001731, No. 03A-A-056-DEQ, Final Decision and Order, ("Director's Decision") October 13, 2003, accepting in part the Administrative Law Judge Decision, September 12, 2003 ("ALJ Decision").

proceedings before ADEQ, the Office of Administrative hearings ("OAH") and the memoranda submitted by counsel.

1. Factual and procedural background

Carlota applied for the permit in this case in September 2001. The request was to renew an earlier issued permit for the same project.[2] Carlota first applied for an Air Quality Control Permit from ADEQ in 1994 to construct and operate an open pit mine, heap leach and solvent extraction electrowinning facility in Pinto Valley, Gila County near Miami, Arizona ("Carlota Mine").[3] After a period of assessment and public comment concerning the proposed project, ADEQ determined that the Carlota Mine would be a "minor source" for purposes of regulation under the applicable air quality laws.[4] Based on its assessment and application of applicable law, ADEQ excluded certain mobile source emissions and fugitive emissions in calculating whether the Carlota a Mine would be a major or minor source.[5] ADEQ issued a Class II Air Quality Control Permit to Carlota for the Carlota Mine on March 14, 1997 (1997 Permit").[6] Carlota did not construct the Mine during the five-year term of the 1997 permit.[7]

On September 12, 2001, Carlota applied to renew its Permit for the Carlota Mine.[8] Carlota did not change its proposed operations at the Mine in the 2001 permit application.[9] ADEQ again excluded certain mobile source emissions and fugitive emissions in determining whether the Carlota Mine would be regulated as a major or a minor source.[10] ADEQ again concluded that the Carlota Mine would be a "minor source" under the applicable air quality laws.[11] The Plaintiffs submitted comments to ADEQ raising various issues and arguing that the Permit should not be issued to Carlota for the Carlota Mine.[12] In particular, Plaintiffs argued that ADEQ improperly limited the emissions used to determine the major/minor stationary source status of the Carlota Mine because it failed to include the emissions from Carlota's on-site mining equipment and excluded fugitive emissions in its calculations that led to a determination that Carlota was a "minor source."[13] In addition, Plaintiffs argued that ADEQ improperly failed to regulate air emissions of sulfuric acid mist because it did not determine the amount of sulfuric

[2] ALJ Decision, Revised Stipulated Statement of Facts ("RSSF"), ¶ 67.¶
[3] *Id.* ¶ 45.
[4] *Id.* ¶ 64
[5] *Id.* ¶¶ 57, 58.
[6] *Id.* ¶ 62
[7] *Id.* ¶ 66
[8] *Id.* ¶ 67
[9] *Id.* ¶ 72
[10] *Id.* ¶ 68
[11] *Id.* ¶ 70.
[12] *Id.* ¶¶ 74, 75.
[13] Plaintiffs' Opening Brief ("Plaintiffs' Brief"), February 20, 2004, p.

acid applied to the heap leach pad from nozzles on the impulse, or wobbler, sprinklers.[14] ADEQ issued a renewal Permit to Carlota in February 2003 ("2003 Permit").[15]

Plaintiffs challenged ADEQ's decision to issue the permit under Arizona's Uniform Administrative Hearing Procedures statutes.[16] The parties submitted Cross-Motions For Summary Judgment to the OAH based on extensive Stipulated Facts. The ALJ held a hearing on the Cross Motions and issued his recommended decision in which he recommended that ADEQ's issuance of the Permit be upheld.[17] On October 13, 2003, the Director of ADEQ issued his Final Decision in which he accepted, with minor revisions, the Recommended Decision of the ALJ "to the extent that it affirms the issuance of the 2003 renewal permit to Carlota Copper Company."[18] The Director rejected the ALJ conclusions of Law relating to the application of res judicata and collateral estoppel.[19] Plaintiffs timely filed an appeal to this Court of the Director's Final Decision to renew the Permit for the Carlota Mine.[20]

The issues of this appeal involve extensive and complex facts and a number of federal and state regulatory provisions. Counsel for all parties are to be commended for their excellent and helpful memoranda and briefs. Distilled, there are four issues in this case. First, Plaintiffs contend that the proposed Carlota Mine should be classified a major source for purposes of air quality regulation.[21] They argue that ADEQ erred in classifying the proposed project as a "minor source." Specifically they contend that ADEQ should have included emissions from the on-site mining equipment in the calculation to determine whether the project meets the threshold for classification as a major source. ADEQ and Carlota contend that those emissions were properly excluded from the calculation and that characterizing the project as a minor source for purposes of air quality regulation was correct.[22]

Second, Plaintiffs contend that even if Carlota Mine is not a major source, the Director erred in concluding that the proposed mine is not subject to a variety of regulatory requirements.[23] Because they argue that the designation was correct, Defendants likewise contend that ADEQ's treatment of the consequences of that designation, including exemption from certain regulatory requirements, is correct.[24]

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[14] Plaintiffs' Brief, p.
[15] ALJ Decision, ¶ 70
[16] *Id.*, ¶82; A.R.S § 41-1092 *et seq*.
[17] ALJ Decision.
[18] Director's Decision.
[19] *Id.*
[20] Plaintiffs do not challenge the Director's decision to reject the recommendations regarding res judicata and collateral estoppel.
[21] Plaintiffs' Brief, pp. 18-25.
[22] Carlota Copper Company's Answering Brief ("Carlota Brief"), April 5, 2004, pp. 8-17; Response Brief of Stephen A. Owens, Director of the Arizona Department of Environmental Quality ("ADEQ"), and ADEQ ("ADEQ Brief"), April 5, 2004, pp. 4-11.
[23] Plaintiff's Brief, pp. 25-29.
[24] ADEQ Brief, pp. 11-15; Carlota Brief, pp. 18-24.

Third, Plaintiffs argue that ADEQ's failure to calculate and limit the sulfuric acid emissions (H_2SO_4) do not comply with the Arizona and federal Clean Air Acts. Plaintiffs contend that the Director erred in characterizing the sulfuric acid emissions as "fugitive emissions" not included in assessing the major source status.[25] Defendants contend that the Director properly considered sulfuric acid emissions from Carlota's leach pad.[26]

Fourth and finally, Defendant Carlota contends that the Plaintiffs are barred by the doctrines of res judicata and collateral estoppel from challenging the 2003 permit on the stated grounds by the proceedings regarding the 1997 permit.[27] Plaintiffs argue that the issues of res judicata and collateral estoppel are not properly before the Court on this appeal.[28]

In his final order, the Director concluded Plaintiffs were not barred from contesting the permit but that the 2003 Permit was properly issued.[29] Plaintiffs timely filed an administrative review action in this Court.

2. Standard of Review

The issues in the appeal involve ADEQ's application of the federal Clean Air Act and Arizona Clean Air Act to Carlota's proposed mining operation. Based as they were on the parties' submission of stipulated facts, the agency's findings of fact are not in question.[30] Although enmeshed in complex facts, the issues in this appeal are questions of law that this Court reviews *de novo*. On appeal of an administrative agency's decision pursuant to the Administrative Review Act, the Superior Court determines whether the administrative action was supported by substantial evidence, was contrary to law, was arbitrary and capricious, or was an abuse of discretion.[31] As to questions of fact, this Court does not substitute its conclusion for that of the administrative agency, but reviews the record only to determine whether substantial evidence supports the agency's decision.[32] Questions of statutory interpretation involve questions of law and the reviewing court is not bound by the administrative agency's conclusion.[33] The reviewing court applies its own independent judgment to questions of

[25] Plaintiffs' Brief, pp. 29-33.
[26] ADEQ Brief, pp. 15-16; Carlota Brief, pp. 24-27.
[27] Carlota Brief, pp. 27-35.
[28] Plaintiffs' Consolidated Reply Brief ("Plaintiffs' Reply Brief"), April 27, 2004, pp. 18-30.
[29] Director's Decision.
[30] Many issues arise from the ALJ Decision, FFOF that actually embody legal issues. The Director adopted the FFOF in his Final Decision.
[31] A.R.S. § 12-910(G); *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).
[32] *Petrlas v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107 (App. 1981).
[33] *Seigal v. Arizona State Liquor Board*, supra.

statutory interpretation.[34] The reviewing court may draw its own conclusions as to whether the administrative agency erred in its interpretation and application of the law.[35]

3. Discussion

In Arizona, ADEQ is charged with administering the federal Clean Air Act, Arizona Air Pollution Control Laws and related regulations.[36] ADEQ has jurisdiction to issue Air Quality Control Permits to facilities that emit air pollutants in any county that does not have permitting authority.[37] Plaintiffs challenge ADEQ's application of the air quality laws and issuance of the Air Quality Control Permit to Carlota for the Carlota Mine, and present important and relevant issues for resolution to this court.

(a) Did ADEQ correctly classify the Carlota Copper Mine a "minor source" of air pollution with respect to air quality regulation?

The federal Clean Air Act ("CAA") regulates the construction of major stationary sources under the New Source Review provisions of Title I of the Clean Air Act and also under Title V permitting provisions of the CAA. ADEQ found that the Carlota mine "is not a 'major source' of air pollution under any applicable permitting program or provisions."[38] "Major sources" of air pollution are subject to regulatory requirements over and above those requirements placed on "minor sources."[39]

The threshold for determining whether a stationary source is a major source depends on whether it is located in an "attainment area" or a "nonattainment area." An attainment area is a region that meets the national ambient air quality standards ("NAAQS"). A nonattainment area is a region that does not meet the NAAQS. In general, a source located in a nonattainment area, that is an area with "dirtier air," is subjected to greater levels of regulation at lower thresholds of emission of specific pollutants.[40] The New Source Review under Title I encompasses two programs. Nonattainment New Source Review is applicable to new major stationary sources located in an area that does not meet NAAQS for certain pollutants.[41] A second regulatory

[34] *Webb v. State ex rel. Arizona Bd. of medical Examiners*, 202 Ariz. 555, 557, 48 P.3d 505, 507 (App. 2002).
[35] *Carondelet Health Services v. Arizona Health Care Cost Containment System Administration*, 182 Ariz. 502, 504, 897 P.2d 1388 (App. 1995).
[36] A.R.S. § 49-402(A).
[37] Id.
[38] ALJ Decision, FFOF, ¶84.
[39] A.A.C. R18-2-402(B); A.A.C. R18-2-403(A); A.A.C. R18-2-406(A).
[40] ALJ Decision, Revised Stipulated Statement of Facts ("RSSF"), ¶¶ 93-94. The parties agree that the area in which the Carlota Mine is located is an attainment area for NO_x and a nonattainment area for PM_{10} and SO_2. RSSF, ¶¶ 9-11.
[41] ALJ Decision, RSSF ¶ 93; 42 U.S.C. §§ 7501-7515.

program, Prevention of significant deterioration ("PSD"), applies to new major stationary sources located in areas that have achieved NAAQS for a specific criteria pollutant.[42]

In addition, Title V of the federal Clean Air Act Amendments of 1990 requires that major stationary sources obtain federal operating permits (Title V permits).[43] Arizona has adopted statutes and rules to implement both the NSR and Title V permitting programs. Each of these regulatory programs establishes an emissions threshold that triggers applicability of that program's requirements. Sources with emissions below the relevant thresholds are not subject to that program's requirements. The Title V permitting program and the New Source Review permitting program of Title I apply only to major stationary sources.

The parties do not dispute most of the specifics of the regulatory provisions and they do not dispute the emissions thresholds applicable to these programs. Rather, Plaintiffs contend that ADEQ erred in excluding tailpipe emissions from Carlota's on-site mobile mining equipment from the calculations to determine whether Carlota met the threshold with respect to these pollutants.[44] Simply stated, if the tailpipe emissions are included in the calculation, Carlota Mine's emissions would far exceed the applicable thresholds and Carlota Mine would be a "major source" for purposes of the air quality regulations.[45] If excluded, Carlota Mine's emissions levels are far below the applicable thresholds. The ALJ found that the tailpipe emissions "have properly been excluded by ADEQ from the 'major source' calculations."[46]

Plaintiffs advance several arguments for why the Carlota Project is a major source of air pollution for PSD, NAA and Title V purposes. First, Plaintiffs contend that whether to include the tailpipe emissions from the on-site mining equipment should be determined by the state law and regulation and that under state law, these emissions are included in the definition of stationary source.[47] Defendants contend, and the ALJ found, that "[s]tates have been preempted by federal law from regulating tail pipe emissions."[48] Applying federal law, they argue, tailpipe emissions are specifically excluded from the definition of a stationary source. Further, Defendants contend that, even if not preempted from regulation, the tailpipe emissions are not included in the definition of stationary source under Arizona law.[49]

(1) Does Arizona law include emissions from nonroad vehicles?.

[42] ALJ Decision, RSSF ¶ 94; 42 U.S.C. § 7470.
[43] 42 U.S.C. § 7661.
[44] Plaintiffs Brief, PP. 18-25.
[45] Carlota would then be subject to the NSR and the PSD programs with respect to specific pollutants depending on the attainment/nonattainment status with respect to a pollutant.
[46] ALJ Decision, FFOF ¶85.
[47] Plaintiff's Brief, PP. 18-25.
[48] ALJ Decision, FFOF ¶¶ 86, 87.
[49] Carlota Brief, pp. 12-13; ADEQ Brief, pp. 6-8.

ADEQ did not include the mobile source emissions in the calculations because an Air quality Control Permit only applies to stationary source emissions. Under Arizona law a stationary source is defined as "any building, structure, facility or installation subject to regulation pursuant to A.R.S. § 49-426(8) which emits or may emit any air pollutant."[50] According to ADEQ, non-road vehicles do not fit within the classification of "stationary sources." Under the definition, Arizona limited the application of the term "stationary source" to "any facility, building, equipment, device or machine that operates at a fixed location and that emits or generates air contaminants."[51] On its face, the definition does not appear to include nonroad vehicles, because they are not stationary, but movable vehicles.

Plaintiffs argue that the tailpipe emissions are included in the definition of stationary source because the "Arizona definition of 'stationary source' does not exclude tail-pipe emissions from on-site mining equipment."[52] Plaintiffs note that the definition does not contain language excluding emissions from on-site mining equipment.[53] However, particularly in light of the agency's interpretation of its definition of "stationary source," the mere absence of language excluding non-road vehicles does suggest that they are included. An agency's interpretation of its statutes is entitled to great weight by this Court.[54] The agency's interpretation is entitled to particular deference where the public has relied on that interpretation.[55] Arizona law does not include emissions from nonroad vehicles in its determination whether a source is a major source.

(2) Does federal Law preempt the states from regulating nonroad vehicles?

Defendants contend, and the ALJ found, that Arizona is precluded from regulating nonroad vehicles as part of its air quality permitting program because federal law preempts such regulation.[56] Federal law precludes any state from regulating or enforcing requirements relating to the control of emissions from certain nonroad engines or nonroad vehicles subject to federal regulation.[57] However, the preemptive language of that section is not dispositive. "Once it has been established which nonroad sources the states are preempted from regulating, the question remains what sorts of regulations the states are preempted from adopting."[58] In *Engine Manufacturers*, the court recognized that "the longstanding scheme of motor vehicle emissions control has always permitted the states to adopt in-use regulations—such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles—that are expressly intended to control emissions. . . . Section 209(d) [regarding nonroad vehicles]

[50] A.A.C. R18-2-101 (111).
[51] A.R.S. § 49-401.01(36).
[52] Plaintiffs' Brief, p. 18-25.
[53] Plaintiffs' Reply, p. 7-8.
[54] *Better Homes Construction, Inc. v. Goldwater*, 203 Ariz. 295, 53 P.3d 1139, 1143 (App. 2002).
[55] *See,Chee Lee v. Superior Court*, 81 Ariz. 142, 147, 302 P. 2d 529, 533 (1956)
[56] ALJ Decision, FFOF ¶¶ 86-87; Carlota Brief, p.11; ADEQ Brief, p. 7.
[57] 42 U.S.C.A. § 7543.
[58] *Engine Manufacturers Ass'n v. U.S.E.P.A*, 88 F.3d 1075, 1093 (D.C. Cir. 1996).

does, therefore, protect the power of states to adopt such in-use regulations."[59] This Court is not convinced that Arizona is preempted from adopting in-use regulations of nonroad vehicles such as are at issue in the Carlota Mine permit. Nonetheless, because Arizona law does not purport to include the tailpipe emissions from nonroad vehicles in its regulation of stationary sources, the preemption question has little significance.

(3)Does federal law exclude the nonroad vehicles from its definition of stationary source?

The Clean Air Act unequivocally states that a "stationary source" does not include "those emissions resulting directly from an internal combustion engine for transportation purposes or from non-road engines or non-road vehicles as defined in § 216 of the Act."[60] The mobile source emissions at the Carlota Mine come from haul road trucks, front-end loaders, and similar equipment used in the mining operation. All of the equipment are properly designated as non-road vehicles under federal law and their emissions are not included as part of the stationary source. This Court concludes that, applying the federal definition, the emissions from non-road vehicles at the Carlota Mine are properly excluded from the calculations.

Plaintiffs argue that the Carlota Mine vehicles should be included in the federal definition of major stationary source because they are intended to remain at the same location for more than twelve consecutive months.[61] The federal rule that defines nonroad engines excludes some engines that remain at a location for more than twelve months.[62] The ALJ found that this exception does not apply to the Carlota Mine nonroad engines because the twelve month exception does not apply to "engines that are in or on equipment that is self-propelled, or designed to be propelled while performing its function."[63] The ALJ's finding, adopted by the Director, accurately applies the federal rule.

(4) Did ADEQ properly exclude "fugitive emissions?"

ADEQ found that "fugitive emissions" were properly excluded from the calculations regarding whether Carlota Mine is a "major source."[64] Fugitive emissions are those "which cannot reasonable pass-through a stack, chimney, vent, or other functionally equivalent opening."[65] In general, emissions that come from large areas that cannot feasibly be captured in a building or other structure cannot be passed through a stack or similar opening that would allow the application of direct emission controls. With certain exceptions, "fugitive emissions"

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[59] *Engine Manufacturers Ass'n v. U.S.E.P.A*, 88 F3d at 1095.
[60] 42 U.S.C. § 7602(z).
[61] Plaintiffs' Reply Brief pp. 9-12.
[62] 40 C.F.R. § 89.2.
[63] ALJ Decision, FFOF, ¶ 89.
[64] ALJ Decision, FFOF, ¶ 91.
[65] A.A.C. R18-2 101 (49).

are not included in the calculations to determine whether a source is a "major source."[66] Accordingly, ADEQ properly excluded "fugitive emissions" in determining that Carlota Mine is not a "major source."

(b) ADEQ concluded that sulfuric acid mist emissions at Carlota Mine are fugitive.

ADEQ found that sulfuric acid mist emissions resulting from the process of ore extraction at Carlota Mine "cannot and will not be passed through a stack chimney, vent, or similar opening" and therefore are properly classified "fugitive emissions."[67] Plaintiffs argue that the sulfuric acid will be delivered as a liquid through sprinklers and that the emissions from sprinklers are not fugitive emissions but instead are "point source emissions" as courts have held that such delivery can be point sources under the Clean Water Act.[68] Plaintiffs rely on case law that held that a spray nozzle constituted a "point source" under the federal Clean Water Act.[69] However, that argument is not persuasive because it is inapplicable to the question whether sulfuric acid delivered by sprinklers can be considered "fugitive emissions" under the Clean Air Act.[70] Regardless how the liquid is regulated under the Clean Water Act, the air emissions that come from sulfuric acid mist could not reasonable pass through a stack or similar opening. Accordingly, ADEQ properly determined that the sulfuric acid mist is properly characterized as "fugitive emissions."[71]

(c) Is Carlota subject to certain NSR requirements even though it is a minor source?

Plaintiffs contend that even if Carlota is not a major source, Carlota and ADEQ should still be subject to regulations that require Carlota to perform a source impact or increment analysis, demonstrate reasonable further progress and obtain emissions offsets under the PSD and NAA programs. ADEQ decided that minor sources are not subject to these provisions.[72]

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[66] A.A.C. R18-2-101 (64)(c). "The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of Section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source." Carlota Mine does not fall within any of the listed categories. Regulations will not apply to a source if that source "would be a major source or major modification only if fugitive emissions . . . are considered in calculating the potential emissions of the source. …" A.A.C. R18-2-406(c).

[67] ALJ Decision, FFOF, ¶ 95.

[68] Plaintiffs' Brief, pp. 29-33.

[69] Plaintiffs' Brief , p. 31, citing *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002).

[70] *Sierra Club v. Larson*, 2 F3d 462 (1st Cir. 1993). There the court rejected the argument that the Clean Air Act definition of "stationary source" was analogous to the Clean Water Act's definition of "point source." "We find little help from a different term used in a different statutory scheme." *Sierra Club v. Larson*, 309 F.3d at 468, n. 5.

[71] This does not mean that the sulfuric acid emissions are not regulated. The permit requires Carlota "to protect public health from any potential harmful results from the sulphuric acid mist emissions, including specific emission limits and standards, air pollution control requirements, and ambient air quality monitoring." ALJ Decision, FFOF ¶ 95.

[72] ALJ Decision, FFOF, ¶¶. 93-94.

(1) Is Carlota required to perform source impact or increment consumption analyses even if it is a minor source?

In attainment and unclassifiable areas, both federal and state law provides that major sources conduct air impact analyses and monitoring in order to determine whether, among other things, they exceed an identified pollution "increment."[73] Plaintiffs contend that such analyses are required for both major and minor sources.[74] ADEQ found that Plaintiff's "assertion that a full-blown impact analysis is required for 'minor sources' is unfounded."[75]

Arizona law requires major sources in attainment or unclassifiable areas to conduct an air impact analysis and monitoring pursuant to specific requirements. The person applying for the permit or permit revision must perform an air impact analysis and monitoring demonstrating that "allowable emission increases from the proposed new major source or major modification" do not cause or contribute to an increase in excess of the applicable increment or ambient air quality standard.[76] Minor sources are not required to conduct these types of analyses and monitoring or to ensure that the emissions do not exceed the applicable increments.

Plaintiffs rely on A.R.S. § 49-426 which requires Pollution Control Permits to prohibit pollution in "amounts in excess of applicable emissions rates."[77] That provision does not establish emission rate limits; rather it prohibits a source from exceeding otherwise "applicable emissions rates." Plaintiffs' reading of the statute confuses increment consumption with emission limitations by characterizing the PSD increments as emissions rates or limitations as described in the Arizona air quality permitting statute.[78] Plaintiffs' argument assumes that increments are "applicable emissions rates." Because increment limitations are not applicable emissions rates for minor sources, it cannot be said that the A.R.S. § 49-426 imposes increment limitations on minor sources. The Arizona rules, specifically, and the statutory section, correctly read, do not impose increment limits on minor sources.

Similarly, federal regulations do not require increment analyses for minor sources. The federal regulations relied on by Plaintiffs only apply to applicants seeking nonattainment area major source permits.[79] Moreover, the federal rules are not applicable because they apply only to states that have not received approval of their own PSD program. EPA approved Arizona's

[73] 42 U.S.C. § 7473.
[74] Plaintiffs' Brief, pp. 25-28.
[75] ALJ Decision, ¶ 93.
[76] A.A.C. R18-2-406(A)(5)
[77] A.R.S. § 49-426(N)(2); Plaintiffs' Brief pp. 25-28.
[78] Emission limitations are "specific restrictions on the composition of pollutants which may be emitted into the air from a particular source." *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1169 (9th Circ. 1979). Increments refer to the concentration of a pollutant of the ambient air in a particular attainment area.
[79] 40 C.F.R. 52.21(i)(2) ("The requirements of paragraphs (j) through ® of this section apply to any major stationary source").

regulations when it approved Arizona's implementation plan adopting the State's Prevention of Significant Deterioration program.[80] The federal regulations are not applicable and even if applicable, the federal regulations do not apply to minor source permits in nonattainment areas.

Because Carlota Mine is not a major source, it is not required by either federal or state law to conduct increment analyses.

(2) Did ADEQ properly determine that "emission offsets" and "reasonable further progress" requirements do not apply to the Carlota Project?

The Clean Air Act requires that for permits to construct and operate in nonattainment areas, the permitting agency determine that "sufficient offsetting emissions reductions have been obtained" and find "reasonable further progress" toward incremental reductions in emissions.[81] Plaintiffs contend that because Carlota Mine is proposed in a nonattainment area for certain pollutants, ADEQ should have required that Carlota "demonstrated that 'reasonable further progress' had been made toward sufficient offsetting emissions reductions for the Project" regardless whether Carlota is a major source.[82] ADEQ found that because Carlota is not a "major source," neither federal nor state law requires offsets to demonstrate "reasonable further progress."[83] Defendants argue that "there are simply no offset or reasonable further progress requirements that apply to minor sources."[84]

The Clean Air Act requires states to have specific plans for nonattainment areas and provides that states must require "permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title."[85] Section 7503 sets forth the offset emissions and reasonable further progress requirements. Only major sources are required to obtain a nonattainment area permit in accordance with the permit requirements set forth in Section 7503. Similarly, Arizona law requires offsets necessary to demonstrate reasonable further progress only for major sources.[86] Because only major sources are required to obtain nonattainment area permits, only major sources are subject to the permit requirements described in section 7503. Plaintiffs attempt to read the requirements in isolation without the predicate requirement of a permit. Because Carlota was correctly designated a minor source for permitting purposes, offsets demonstrating reasonable further progress were not required.

(d) Are Plaintiffs barred by res judicata and collateral estoppel regarding the 2003 permit?

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[80] See, 48 Fed. Reg. 19878, 19879 (May 3, 1983).
[81] 42 U.S.C. §7503(a)(1)(A).
[82] Plaintiffs' Brief p. 28-29.
[83] ALJ Decision ¶94.
[84] ADEQ Brief , p. 14-15.; Carlota Brief, pp. 22-24.
[85] 42 U.S.C. §7502.
[86] A.A.C. R18-2-404(A).

The ALJ concluded that Plaintiffs were barred by the doctrines of res judicata and collateral estoppel from asserting these claims with respect to the 2003 permit.[87] The Director rejected the res judicata and collateral estoppel conclusions of the ALJ.[88] Plaintiffs appeal the Director's Final Decision and Order approving the Permit. They did not appeal his decision regarding res judicata and collateral estoppel. Carlota did not appeal the Director's decision. However, Carlota offers preclusion as an independent basis to uphold the Director's Decision.[89] The problem with Carlota's position is that it offers the Director's rejection of issue preclusion as an independent ground for upholding the Director's decision. It attempts to uphold the Director's decision by attacking the Director's decision.

The issue is not properly raised in this appeal and this Court lacks jurisdiction to consider Carlota's preclusion argument.[90] In the context of a civil appeal, "when an appellee who has prevailed on the merits in the trial court argues as an alternative ground for affirmance on appeal that the trial court did not need to reach the merits, he is actually arguing in support of the result that the trial court reached but attacking the judgment that the court entered. . . . [T]he appellee must file a cross-appeal to raise such an argument."[91] Carlota's preclusion argument fails to qualify as a cross-issue for another reason. If Carlota prevailed on this argument, Plaintiff's rights on appeal would be lessened because they would be deprived of a resolution of their claim on the merits.[92] A cross-issue is not properly raised in an answering brief if, as here, it would lessen the appealing party's rights on appeal.[93]

Carlota argues that issue preclusion is properly raised because the Director's decision can be affirmed on any ground supported by the record.[94] However, Carlota does not seek to affirm the Director's decision. It seeks to reverse it. The preclusion argument raised by Carlota

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[87] ALJ Decision, Conclusions of Law, ¶¶ 3-12.

[88] Director's Final Decision and Order, October 13, 2003. "The Director rejects the Administrative Law Judge's Conclusions of Law 3 through 12, relating to the application of res judicata and collateral estoppel."

[89] Carlota Brief pp. 27-35. Carlota contends that the Plaintiffs are precluded from appealing the 2003 permit by the proceedings surrounding the original 1997 permit. The Director and ADEQ do not join Carlota in attempting to raise this issue in this appeal.

[90] *See, Salt River Project Agr. Imp. And Power Dist. v. Apache County*, 171 Ariz. 476, 480,81, 831 P2d 852 (App. 1992)("We lack jurisdiction to consider Apache County's preclusion argument.").

[91] *Id.* 171 Ariz. at 481; 831 P.2d at 857. The Arizona Tax Court ruled in the county's favor on the merits and did not reach the preclusion arguments. The county, as appellee on appeal, argued that preclusion was an alternative ground for affirming the judgment. The court held that the preclusion argument could only be raised by cross-appeal. To raise that argument, the county was required to file a timely cross-appeal from the tax court's judgment . "[B]ecause it failed to do so, we do not consider that argument." *Id.*

[92] See, *Salt River Project Agr. Imp. And Power Dist. v. Apache County*, *supra.* ("In the absence of a cross-appeal, an appellee may raise a cross-issue in its answering brief only when it meets these criteria:
… (3) The cross-issue must not result in an enlargement of appellee's rights or a lessening of appellant's rights on appeal.").

[93] *Id.*

[94] Carlota Brief p. 27. Carlota relies on *State v. Taylor*, 2 P3d 674, 678 (Ariz. App. 1999). Carlota's reliance on *State v. Taylor* is misplaced because Carlota wants to attack the Director's decision.

as an alternative ground to affirm the judgment is not properly before this Court. The Court will not consider that argument.

4. Conclusion

Applying either federal or state air quality regulations, the tailpipe emissions from the nonroad vehicles and fugitive emissions at the Carlota mine were properly excluded from the calculation to determine whether Carlota meets the emission thresholds to be a major source. The Carlota Mine was correctly characterized as a "minor source." Carlota is not subject to New Source Review requirements of increment analysis to demonstrate reasonable further progress, and to obtain emissions offsets because those requirements apply only to major sources. ADEQ correctly regulated the sulfuric acid emissions at Carlota Mine. For those reasons, this Court concludes that ADEQ properly upheld the 2003 Permit issued to Carlota for the Carlota mine. The question of issue preclusion is not properly before this Court and the Court declines to address it.

IT IS THEREFORE ORDERED that the ADEQ Decision is affirmed.

IT IS FURTHER ORDERED denying the relief requested by the Plaintiff in this administrative review action.

IT IS FURTHER ORDERED that counsel for the Defendant Carlota shall lodge an order consistent with this opinion no later than December 15, 2004.